Supreme Court, U.S.
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No. 00-429

In The

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA and PRUDENTIAL HEALTH CARE PLAN OF CALIFORNIA, INC.,

Petitioners,

v.

DAVID E. SINTEK, D.D.S.,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether, under 28 U.S.C. § 1257(a), the Supreme Court lacks jurisdiction to grant a writ of certiorari to review an unpublished opinion of a California intermediate appellate court following discretionary review of an interlocutory order of the trial court.

2. Whether a California state court can order a party to an arbitration agreement that is subject to the Federal Arbitration Act to engage in discovery and a motion that might result in consolidated classwide arbitration where the agreement does not forbid such a process and the agreement affirmatively provides it is to be construed and governed by the laws of the State of California.

PARTIES TO THE PROCEEDING

Petitioners are The Prudential Insurance Company of America and Prudential Health Care Plan of California, Inc. Respondent is David E. Sintek.

RULE 29.6 STATEMENT

Rule 29.6 is inapplicable, because respondent David E. Sintek is an individual.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Plaintiff/respondent David E. Sintek ("Sintek") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari ("Petition") filed by defendants/petitioners Prudential Insurance Company of America and Prudential Health Care Plan of California, Inc. (collectively "Petitioners" or "Prudential"), in which they are seeking review of the California Court of Appeal's decision in *Sintek v. Prudential Ins. Co. of America*, No. D031911 (Cal. Ct. App. Mar. 21, 2000) (nonpub. op.) (the "Opinion").

NO JURISDICTIONAL AUTHORITY

This Court has no jurisdictional authority to grant Prudential's Petition under 28 U.S.C. § 1257(a). The Opinion for which review is sought in this case is from discretionary review (denying relief) of an interlocutory order of the trial court. Accordingly, there is no final judgment. Under *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), therefore, this Court lacks jurisdiction to review the Opinion by writ of certiorari. This lack of jurisdiction is briefed in further detail below at part I, entitled, "There Is No Jurisdiction."

TEXT OF OTHER STATUTES INVOLVED

In addition to the statutory provisions set forth in the Petition, the jurisdictional statute, 28 U.S.C. § 1257(a),

and California Rules of Court, rule 977(a) and (b), are also pertinent. They provide:

28 U.S.C. § 1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

California Rules of Court, Rule 977

Citation of Opinions

(a) [Unpublished opinions] An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same

> defendant or respondent in another such action or proceeding. [Emphasis in original.]

The federal statute is discussed below at part I, entitled, "There Is No Jurisdiction." The state rule is discussed below at part II, entitled, "The Opinion Sets No Precedent and Affects Only Sintek and Prudential."

STATEMENT OF THE CASE

The "Factual and Procedural Background," as set forth in the Opinion, is hereby incorporated by reference. *See* Pet., App. at 17a-18a.

Further, Prudential inaccurately set forth the procedural history from the proceedings in the trial court. Specifically, Prudential stated that the trial court "reversed itself" when it granted Prudential's motion to compel arbitration but stayed the arbitration until such time that it could rule on a motion to certify a class. Pet. at 3-4. The trial court did not "reverse itself." Rather, on June 19, 1998, the court issued a telephonic ruling that was subject to oral argument. *See* Pet., App. at 13a-16a. After oral argument, the trial court took the matter under submission and issued a formal written ruling on August 11, 1998. *Id.*, at 17a-18a (June 19 telephonic a "tentative ruling").

Finally, Prudential omitted an important provision of the parties' arbitration agreement. Article III.H, of the parties' agreement states as follows: "All rights and

remedies hereunder will be cumulative and not alternative, and **this Agreement shall be construed and governed by the laws of the State of California[.]**" (Emphasis added.)

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because this Court does not have jurisdiction. The Opinion for which review is sought is a decision of a California intermediate appellate court following discretionary review (denying relief) of an interlocutory order from the trial court. The Opinion is not a "final judgment," as that term is used in 28 U.S.C. § 1257(a); nor does this case present one of the exceptional situations where jurisdiction may nonetheless be conferred. Indeed, significant issues must first be determined before review by this Court would be proper or fruitful. More specifically, neither the state trial court nor state appellate courts have been presented with the issue, let alone decided, **whether** arbitration proceedings will be consolidated. If consolidation or class certification is denied, for instance, Prudential's Petition would be moot.

Additionally, the Petition should be denied because the Opinion by the California intermediate appellate court was unpublished. Accordingly, the Opinion has no precedential value, affecting only Sintek and Prudential.

As for the merits, the Petition should be denied because the Opinion addresses only state procedural rules that do not conflict with the Federal Arbitration Act ("FAA" or the "Act"); nor does the Opinion conflict with

the federal authorities relied upon by Prudential. The Opinion is in harmony with the view taken by the First Circuit (applying state procedural law) and is readily distinguishable from decisions from the seven circuits (applying federal procedural law) and the state courts (also applying federal procedural law) that Prudential claims are in purported conflict.

Finally, because the Opinion enforces the arbitration agreement under the law governing the arbitration provision agreed to by the parties (i.e., California law), the Opinion properly construes the FAA, promotes the legislative intent behind the Act, and does not encourage forum shopping.

I. There Is No Jurisdiction

This Court lacks jurisdiction to grant Prudential's Petition. This Court's review of state court decisions is limited to "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). In an attempt to invoke jurisdiction under 28 U.S.C. § 1257(a), Prudential claims that the Opinion is a "final decision" rejecting a "federal law challenge" and a "final judgment" staying the arbitration proceedings. *See* Pet. at 1. Prudential's characterization of the Opinion is wrong.

The language contained in 28 U.S.C. § 1257(a) "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120,

124 (1945). In fact, to be reviewable by this Court, a state court decision "must . . . be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street Ry v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). The state court decision "must be the final word of a final court." *Ibid.*

Here, however, the California intermediate appellate court's Opinion for which review is sought in this case is not a "determination of the litigation." To the contrary, as conclusively stated by the court in its Opinion, "the [trial] court's order is interlocutory and not appealable." Pet., App. 4a. After all, in the Opinion the appellate court merely affirmed the trial court's order that concluded by setting a hearing "to discuss a schedule for discovery and a motion to certify the class." *Id.*, at 18a. Indeed, the state trial court may ultimately determine that Sintek's claims should not proceed on a classwide basis. *See* Pet., App. at 6a. Moreover, in the event a class is certified, Prudential will be able to appeal such a ruling in California appellate courts (and this Court) after entry of a **final judgment** confirming any arbitration award. At that time, Prudential will be able to seek judicial review of any rulings related to whatever class or consolidation procedures are utilized. Even if the California appellate courts adhere to their prior determinations that classwide arbitrations are permissible, such a ruling in this case following final judgment should in no way limit this Court's ability to review the issue on final judgment. *Jefferson*, 522 U.S. at 83. For these reasons, the Opinion here is unquestionably interlocutory.

Finally, Sintek is aware of the exceptions to the finality requirement set forth by the Court in *Cox Broad. Corp.*

v. Cohn, 420 U.S. 469 (1975). However, the California intermediate appellate court's Opinion does not come within any of the limited situations in which the Court may treat a state court judgment as final, even though further proceedings are to take place.

As explained in *Cox*, the finality requirement is satisfied only where, despite further state court proceedings, (1) "for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," (2) "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings," (3) "the federal claim has been finally decided with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," (4) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox*, 420 U.S. at 479-83.

None of these exceptional situations is present here: (1) the purported "federal issue" is not conclusive, because Prudential may defeat class certification; no outcome is "preordained"; (2) the purported "federal issue" may not require a decision following the outcome in the state court proceedings, either because the class may not

be certified or arbitration proceedings may not be consolidated or because Prudential may prevail at the arbitration; (3) the purported "federal issue" can be reviewed following entry of a final judgment confirming any arbitration award; and (4) the reversal of the Opinion based on the purported "federal issue" would not preclude further litigation on the claims, because Prudential will be required to defend Sintek's claims regardless whether a class is certified or arbitration proceedings are consolidated.

In sum, because there is no final judgment, and because this case does not fall within any recognized exceptions to the rule limiting jurisdiction to review of final judgments, the Court lacks jurisdiction to grant the requested writ of certiorari. Because the California courts must be afforded the opportunity to reach a final judgment before review by this Court, the Petition should be denied.

II. The Opinion Sets No Precedent and Affects Only Sintek and Prudential

Sintek notes that, in determining which matters to review, this Court is interested in opinions that have a more far-reaching effect than those that affect only the litigants. Here, the Opinion has no precedential value and affects only Sintek and Prudential.

The California Court of Appeal's Opinion was not published. Subject to limited exceptions (none of which is

even arguably applicable here[1]), unpublished opinions of a Court of Appeal cannot be cited or relied on by a court or a party in any other action or proceeding. Cal. Rules of Court, rule 977(a); *Davis v. Superior Court*, 27 Cal. App. 4th 623, 628, 33 Cal. Rptr. 2d 6, 9, n.2 (Cal. Ct. App. 1994); *Barber v. Superior Court*, 234 Cal. App. 3d 1076, 1082, 285 Cal. Rptr. 668, 671 (Cal. Ct. App. 1991); *see also Hankins v. El Torito Restaurants, Inc.*, 63 Cal. App. 4th 510, 518, 74 Cal. Rptr. 2d 684, 689, n.2 (Cal. Ct. App. 1998).

Because unpublished opinions cannot be cited, such opinions necessarily have no precedential effect. *See Nelson v. Justice Court*, 86 Cal. App. 3d 64, 66, 150 Cal.

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[1] In California, an unpublished opinion can be cited or relied on only in the following limited circumstances:

- when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel. Cal. Rules of Court, rule 977(b)(1); *see, e.g., Hummel v. First Nat'l Bank*, 191 Cal. App. 3d 489, 49, 236 Cal. Rptr. 449, 450, n.1 (Cal. Ct. App. 1987) (law of the case); *Runyan v. Ellis*, 40 Cal. App. 4th 961, 965, 47 Cal. Rptr. 2d 356, 360 (Cal. Ct. App. 1995) (collateral estoppel).
- when the opinion is relevant to a criminal or disciplinary action or proceeding against the same defendant or respondent. Cal. Rules of Court, rule 977(b)(2).
- when a workers' compensation appeals board case is reported in the "California Compensation Cases" or the "California Workers' Compensation Reporter" and the case is cited to a workers' compensation appeals board. *See Martin v. Workers' Compensation Appeals Bd.*, 59 Cal. App. 4th 333, 345, 69 Cal. Rptr. 2d 138, 146, n.2 (Cal. Ct. App. 1997) (Workers' Compensation Appeals Board panel decisions "are persuasive authority").

Rptr. 49, 50 (Cal. Ct. App. 1978). In fact, citation of an unpublished opinion may cause a California court to return or strike a brief and may lead to monetary sanctions. Cal. Rules of Court, rule 26(a)(2); *see Alicia T. v. County of Los Angeles*, 222 Cal. App. 3d 869, 885-86, 271 Cal. Rptr. 513, 520-21 (Cal. Ct. App. 1990) ($750 sanction assessed against appellant's counsel whose opening and reply brief repeatedly cited unpublished case).

Thus, the Opinion in this case is limited to this case. It will have no impact, precedential or otherwise, on anyone other than Sintek and Prudential. As such, this Court should deny the Petition.

III. The California Intermediate Appellate Court's Opinion Is Not Inconsistent with the Decisions Relied on by Petitioners

Prudential argues that the California intermediate appellate court's Opinion runs afoul of the "very purpose" of the Act, i.e., ensuring that "private agreements to arbitrate are enforced according to their terms." *See* Pet. at 5-11. Prudential contends that the Opinion, and a similarly decided decision from the First Circuit, conflict with the decisions of seven other federal circuits and several states. Prudential is wrong. The instant Opinion is not inconsistent with the decisions relied on by Prudential.

Specifically, as established below, none of the decisions relied on by Prudential invalidated **state** procedures allowing classwide or consolidated arbitration based on the FAA's **substantive** provisions (e.g., 9 U.S.C. § 2). In

this regard, the various federal circuit court and state court decisions relied on by Petitioners are those in which FAA arbitrations were ordered **under § 4 of the FAA**. *See* Pet. at 5-10. However, § 4 merely contains "implementing provisions of the Act" which "expressly apply only to federal courts." *Southland Corp. v. Keating*, 465 U.S. 1, 29 (1984) (O'Connor, J, dissenting). Thus, because California has procedural provisions that allow for consolidated or classwide arbitrations, and the parties chose California law to govern their agreement, the Opinion is in harmony with the cases cited by Prudential.

A. There Is No Division Between the Federal and State Courts over the Issue Presented Here

In order to encourage review by this Court, Prudential has manufactured a conflict between the circuits, by grouping federal decisions into two camps: (1) those circuits that purportedly support the "principal purpose of ensuring that private arbitration agreements are enforced according to their terms" and deny class arbitrations; and (2) the circuit that allowed a class arbitration under state law, thereby purportedly thwarting the FAA's "principal purpose." *See* Pet. at 5-13.

More specifically, Prudential contends that review of the Opinion should be granted, because it follows *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) and conflicts with seven other federal circuits. *See* Pet. at 6-11. Prudential claims that the *New England Energy* decision and the instant Opinion conflict with the following federal decisions: *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th

Cir. 1995); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107 (6th Cir. 1991); *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); and *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989). *See* Pet. at 6-8.

Although the federal circuit courts have reached different conclusions with regard to the permissibility of classwide or consolidated arbitrations, these varied results do not signify conflict. The two groups of decisions are not inconsistent based on their underlying procedural facts. There is no conflict between (1) the Opinion or the *New England Energy* decision, on the one hand, and (2) the seven circuit court decisions identified by Prudential, on the other hand, because in *New England Energy* (like the Opinion here), the court applied state procedural law. *New England Energy*, 855 F.2d at 3 (applying a Massachusetts arbitration consolidation statute).

In the present case, the parties agreed that the arbitration proceeding "shall be construed and governed by the laws of the State of California" which, of course, includes **state procedural law**. (This provision is discussed in greater detail in the text below at part III.B.) For this reason, the Opinion is analogous to the *New England Energy* case, in which the court concluded that, where the state procedural statute authorizes consolidation of arbitration proceedings absent the parties' agreement to the contrary, the state procedure was not invalidated by the FAA. *New England Energy*, 855 F.2d at 3.

In contrast, in each of the decisions from the seven circuits cited by Petitioners, the court based its decision on federal procedural law, specifically § 4 of the FAA, 9 U.S.C. § 4. *Champ*, 55 F.3d at 277 (holding that under § 4 a district court cannot order consolidation absent express agreement of the parties); *American Centennial*, 951 F.2d at 108 (affirming the district court's order compelling a single arbitration under § 4); *United Kingdom*, 998 F.2d at 71 (holding that § 4 does not authorize consolidation of arbitration proceedings by a district court); *Del E. Webb Constr.*, 823 F.2d at 150 (§ 4 limits the authority of district courts to consolidate arbitrations absent express agreement by the parties); *Baesler v. Continental Grain Co.*, 900 F.2d at 1194-95 (affirming the district court's denial, based on § 4, of a motion for summary judgment seeking consolidation of several arbitration claims); *Weyerhaeuser*, 743 F.2d at 637 (affirming the district court's denial of consolidated arbitration under § 4); and *Protective Life*, 873 F.2d at 282 (§ 4 limits a district court from consolidating arbitrations absent express agreement by the parties).

Significantly, three of these federal appellate decisions specifically distinguished their procedural facts (i.e., applying federal procedural law) from those in the First Circuit's *New England Energy* decision (i.e., applying state procedural law). In particular, the Seventh Circuit stated that it was not required to determine whether to follow *New England Energy* because, in the Seventh Circuit's case, the parties did not argue that state arbitration law authorized class arbitration. *Champ*, 55 F.3d at 275, n.2. Similarly, in *United Kingdom*, the Second Circuit expressly noted that its decision differed from *New England Energy*, because in *New England Energy* the First

Circuit "relied on a state arbitration law that specifically authorizes such consolidation." *United Kingdom*, 998 F.2d at 73, n.2. Likewise, in *Baesler*, the Eighth Circuit stated that, because the appellant did not contend that state law contained a procedural provision authorizing consolidated arbitrations, the court did not have to decide whether to follow *New England Energy*. *Baesler*, 900 F.2d at 1195. Thus, contrary to Prudential's suggestion, there is no conflict in the federal appellate court decisions.

The various state authorities relied on by Prudential also are distinguishable. *See* Pet. at 8-10.

Both of the New York cases cited by Prudential fully support Sintek's position. In *Salvano v. Merrill Lynch, Pierce, Fenner & Smith*, 647 N.E.2d 1298 (N.Y. 1995), the court concluded that, because the parties did not explicitly agree state law would govern their arbitration, the agreement fell under the procedural provisions of the FAA. *Id.*, at 1301. In *Cullman Ventures, Inc. v. Conk*, 682 N.Y.S.2d 391 (Sup. Ct. App. Div. 1998), the intermediate appellate court reversed the trial court's order consolidating in New York arbitration proceedings in New York and Indiana (and enjoining the parties from arbitrating in Indiana). In so doing, the appellate court based its decision principally on the fact that New York procedure does not provide for consolidation of arbitration proceedings, citing as authority the Second Circuit's decision in *United Kingdom*, 998 F.2d 68 (holding that consolidation of arbitration proceedings is not authorized under § 4 of the FAA). *Cullman*, 682 N.Y.S.2d at 228-29.

The Alabama and Delaware cases relied upon by Petitioners also are distinguishable from the instant matter. In *Med Ctr. Cars, Inc. v. Smith*, 727 So.2d 9 (Ala. 1998), each of the arbitration clauses at issue specifically invoked FAA procedural rules. *Id.*, at 14, 15 and 16. Therefore, the issue of state procedural rules did not arise. The Delaware Chancery Court's decision in *Steinberg v. Prudential-Bache Securities, Inc.*, No. 8173, 1986 Del. Ch. LEXIS 17 (Del. Ch. Apr. 9, 1986), addressed an attempt by the plaintiff to prevent arbitration altogether and allow class litigation in court. There, the court rejected the plaintiff's suggestion that if arbitration be ordered it should be classwide, because there was no authority for such a procedure under either New York or Delaware law (unlike California which has both statutory and case law authority). *Id.*, at *15.

Thus, the various federal and state decisions cited by Prudential do not conflict with the Opinion here.

B. California Procedural Law Applies to the Parties' Agreement

The parties agreed to apply the law of California. At Article III.H of the parties' contract, Sintek and Prudential agreed as follows:

> All rights and remedies hereunder will be cumulative and not alternative, and **this Agreement shall be construed and governed by the laws of the State of California**[.]

Under California case law, classwide arbitration is permissible. *Keating v. Superior Court*, 31 Cal. 3d 584, 608-14, 645 P.2d 1192, 1206-10, 183 Cal. Rptr. 360 (1982),

app. dism. in part, revd. in part on other grounds sub nom. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984); *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42, 52-56, 65, 78 Cal. Rptr. 2d 779, 785-88, 794 (Cal. Ct. App. 1998), *cert. denied*, 527 U.S. 1003 (1999); *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 1318-22, 231 Cal. Rptr. 315, 319 (Cal. Ct. App. 1986); *Lewis v. Prudential-Bache Securities, Inc.*, 179 Cal. App. 3d 935, 945-46, 225 Cal. Rptr. 69, 75 (Cal. Ct. App. 1986).

Additionally, under California statutory law, Cal. Civ. Proc. Code § 1281.3 allows for the consolidation of arbitration proceedings upon a sufficient showing, *inter alia*, that the disputes arise from the same transaction or series of related transactions and that there is a common issue of law or fact. *See Keating*, 31 Cal.3d at 612 & n.19, 645 P.2d at 1208 & n.19.

Thus, because California law provides for consolidated or classwide arbitration and the parties in their agreement chose California law, this case is analogous to the *New England* decision and is readily distinguishable from those federal and state cases that Prudential claims are in conflict. For these reasons, the Petition should be denied.

The propriety of the application of California's procedural arbitration rules to the parties' agreement is discussed immediately below at part IV.

IV. The Opinion Properly Construes the FAA and Promotes its Principal Purpose of Enforcing Agreements According to Their Terms

Prudential relies on *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995); and *Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468, 478-79 (1989), for the proposition that the purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms. *See* Pet. at 5. Based on these decisions, Prudential specifically argues that the "court below erred in failing to find that the California consolidation statute is preempted in this case by the FAA's basic command to enforce arbitration agreements 'according to their terms.' " *See* Pet. at 17. Prudential does not cite to any express language in the FAA that supports preemption; rather, it relies solely on an argument that the Opinion frustrates FAA's principal purpose. Prudential is wrong.

The Opinion is completely consistent with the FAA. In fact, where (as here) state arbitration rules are to be applied, this Court's decision in *Volt*, 489 U.S. 468, is particularly supportive of Sintek's position. Although *dictum*, the following passage in the *Volt* decision provides significant guidance to the issue currently presented by Prudential:

> **[W]e think the California arbitration rules which the parties have incorporated into their contract generally foster the federal policy favoring arbitration.** As indicated, the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty disputes when some or all of the

> contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, **by giving courts authority to consolidate . . . arbitration proceedings in these situations.**

Id., at 498, n.5 (emphasis added). Equally instructive are the Court's closing remarks:

> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA preempts state laws which "require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration." But **it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself.** Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. . . . **Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.** . . . By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.

Id., at 478-79 (citations omitted; emphasis added).

Very simply, the scope of federal preemption under the FAA is not all-encompassing: "The FAA contains no

express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id.*, at 477. Rather, state law is preempted under the FAA only "to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Ibid.* (citation omitted).

In this regard, the Congressional intent behind section 2 of the FAA, 9 U.S.C. § 2 – a **substantive** provision of the FAA regarding validity and enforceability of arbitration provisions and fully **applicable** in state court – was to declare a national policy favoring arbitration, to overrule the judiciary's reluctance to enforce arbitration agreements, and to treat arbitration agreements the same as all other contracts generally. *See Southland Corp.*, 465 U.S. at 10; *Volt*, 489 U.S. at 478. In contrast, however, there is "no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476.

In *Volt*, the issue before the Court was whether Cal. Civ. Proc. Code § 1281.2(c) – which allows for the stay of an arbitration pending the resolution of related litigation under specified circumstances – was preempted by the FAA. *Id.*, at 477-78. The Court concluded that, because § 1281.2(c) was a state **procedural rule** governing the conduct of the arbitration **and did not disfavor arbitration**, the FAA did not preempt enforcement of the statute. *Id.*, at 478-479. In *Volt*, the Court "h[e]ld that application of the California statute [allowing the trial court to stay arbitration pending resolution of related litigation] is not pre-empted by the [FAA], 9 U.S.C. § 1 et seq., in a case

where the parties have agreed that their arbitration agreement will be governed by the law of California." *Volt*, 489 U.S. at 470.

Like Cal. Civ. Proc. Code § 1281.2(c) at issue in *Volt*, § 1281.3 at issue here applies only to the conduct of the arbitration and actually promotes and favors arbitration by the consolidation process. As the Court of Appeal aptly stated, § 1281.3 "does not conflict with the FAA, because the **procedure** neither invalidates the arbitration clause nor restricts enforceability of the arbitration agreement in a manner not applicable to contracts generally." Pet., App. at 7a (emphasis added). Thus, since Cal. Civ. Proc. Code § 1281.3 does not "undermine the goals and policies of the FAA" (*Volt*, 489 U.S. at 478), the FAA does not preempt application of § 1281.3.

> Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration – rules which are manifestly designed to encourage resort to the arbitral process – simply does not offend the rule of liberal construction [favoring arbitration], nor does it offend any other policy embodied in the FAA.

Id., at 476.

Based on the foregoing, Petitioners' arguments regarding preemption under the FAA are misplaced. Very simply, the Opinion properly construed the arbitration provision at issue under the FAA and this Court's decisions interpreting the Act. Accordingly, the Petition should be denied.

V. The Public Policy Arguments Advanced by Petitioners Are Not Compelling

Prudential argues that the Opinion represents a "nationwide conflict" that requires "prompt resolution" to prevent "forum-shopping" and "judicial interference in arbitrable disputes." *See* Pet. at 13-16. Petitioners' argument in this regard is neither accurate nor compelling.

Preliminarily, as discussed in detail in the text above at part III, there is no conflict between (1) the Opinion or the *New England* decision, on the one hand, and (2) any of the federal or state decisions relied on by Petitioners, on the other hand. The First Circuit is the **only circuit** that has addressed an issue analogous to that presented here. The Opinion follows the First Circuit's *New England* decision. Thus, there is no immediate need to address the issue presented in this case – namely, whether a state court can order a party to an arbitration agreement that is subject to the FAA to engage in discovery and a motion that might result in classwide arbitration where the agreement does not forbid such a process and the agreement affirmatively provides it is to be construed and governed by the state's laws that allow such procedures.

Indeed, Petitioners' arbitration statistics belie their claim that prompt resolution is needed. That, by Petitioners' figures, 140,188 cases were filed with the American Arbitration Association last year alone and still Petitioners are unable to cite any case invalidating a state consolidation procedure is telling. Contrary to Petitioners' rhetoric, this is not as significant an issue as they would like the Court to believe.

Equally insignificant is Petitioners' concern over forum-shopping. California procedure allowing for consolidation of classwide arbitration (Cal. Civ. Proc. Code § 1281.3) was enacted in 1978; and California's highest appellate court specifically approved of classwide arbitration under this statute in 1982 (*Keating*, 31 Cal.3d at 608-14, 645 P.2d at 1206-10). Petitioners, who drafted the agreement, were responsible for the language implementing California procedural law; and the parties did not sign it until 1989, many years after the state's highest court authorized consolidation of classwide arbitration. Thus, Petitioners cannot now complain if a party to the agreement they drafted selects a forum available to him based on language Petitioners used in their form agreement.

Finally, Petitioners overplay the role that might be required of the judiciary in overseeing arbitrations. Petitioners assume that every case on which class discovery is ordered ultimately will be certified. Presumably, many cases would be weeded out on the front end following a determination that they are not suitable for classwide arbitration. As for judicial review on the back end, if anything, the judiciary's workload will be reduced by classwide arbitration. Instead of requiring a potentially unlimited number of courts to confirm (or vacate) a potentially unlimited number of individual arbitration awards, following consolidated arbitration only one court will be required to confirm (or vacate) only one global award. Thus, Petitioners' concern about the effect on the judiciary's workload is misplaced.

Petitioners have not offered any compelling policy reasons for the immediate review of the Opinion here. Accordingly, the Petition should be denied.

CONCLUSION

This Court has no jurisdiction to grant Prudential's Petition under 28 U.S.C. § 1257(a). The Opinion for which review is sought in this case affirms an interlocutory procedural order of the state trial court. Accordingly, the Petition should be denied, because there is no final judgment for this Court to review. *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997).

Further, even if this Court had jurisdiction, review is not warranted because Petitioners have not demonstrated any conflict between reported decisions so as to justify the use of this Court's time and resources. The Opinion is in harmony with the FAA and the authorities interpreting it. The Opinion also is in tune with the "principal purpose of ensuring that private arbitration agreements are enforced according to their terms." After all, "arbitration is still arbitration even if it is consolidated arbitration." *New England*, 855 F.2d at 5. "There is no federal policy favoring arbitration under a certain set of procedural rules." *Volt*, 489 U.S. at 476.

Moreover, because the state intermediate appellate court's Opinion is not published, it has no precedential value and affects only the private litigants involved.

Finally, use of California's procedure to consolidate arbitration proceedings does not conflict with the FAA,

because the procedure neither invalidates the arbitration provision nor restricts enforceability of the arbitration agreement in a manner inapplicable to other contracts generally. To the contrary, this procedure – approved by statute since at least 1978 and by the state's highest court since at least 1982 – encourages arbitration according to the terms of the parties' agreement.

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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